

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company
dba SBC California to Modify D.94-09-065 to
Enable SBC California to Reduce Prices to Meet
Competition.

Application 04-03-035
(Filed March 30, 2004)

**SCOPING MEMO AND RULING
OF ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE**

This ruling determines the scope, schedule, and other matters in accordance with Rules 6(a) and 6.3 of the Commission's Rules of Practice and Procedure (May 2003) (Rules).¹

1. Background

On March 30, 2004, Pacific Bell Telephone Company dba SBC California (SBC) filed this application seeking Commission authorization to "lower or waive any tarified charge . . . to meet a competitor's legal price, irrespective . . . of the . . . price floor tests described in IRD [Decision (D.) 94-09-065]." SBC stated that consumers would benefit from modifying the price floors to enable SBC to lower its prices to meet competitor offerings, and that pricing to meet competition is legal, irrespective of cost.

On April 27, 2004, the assigned Administrative Law Judge (ALJ) issued a ruling directing SBC to respond to requests for copies of the application and

¹ The Commission's Rules of Practice and Procedure are available on the Commission's Website: www.cpuc.ca.gov/PUBLISHED/RULES_PRAC_PROC/8508.htm.

resetting the date for filing protests to May 17, 2004. Four protests were timely filed as follows.

The California Association of Competitive Telecommunications Companies, along with Anew Telecommunications Corporation dba Call America, AT&T Communications of California, Inc., MCI, Inc., Mpower Communications Corporation, and Telscape Communications, Inc. (CALTEL Parties) protested jointly. The CALTEL Parties contend that SBC's proposal would "scrap" the entire D.94-09-065 price floor concept by allowing SBC to price partially competitive services below cost, and thereby thwart emerging competition, contrary to the Commission's intent in adopting the concept. The CALTEL Parties recommend that the Commission reject the application or undertake a comprehensive review of the price floor rules.

Cox California Telcom, L.L.C. and Pac-West Telecomm, Inc. (Cox/Pac-West) jointly protested. They contend that price floors are working well and, due to limited competition, remain necessary. Cox/Pac-West also dispute SBC's legal analysis supporting its request.

The Office of Ratepayer Advocates and The Utility Reform Network (ORA/TURN) protested jointly. They argue that SBC failed to demonstrate new facts that justify modifying D.94-09-065. Like the CALTEL Parties, ORA/TURN request that the Commission dismiss SBC's application.

Paetec Communications also protested. It contends that the local exchange market is insufficiently competitive to remove price floors for SBC, and that SBC's request amounts to shifting all partially competitive services, which are subject to price floors, to the fully competitive category, with no price floors.

SBC filed a reply on May 27, 2004. It argues that the antitrust laws are not intended to shield competitors from competition, and that the Commission

processes for approving tariff rate changes will ensure that SBC does not abrogate price floors across the board.

On July 2, 2004, the Assigned Commissioner and ALJ convened a prehearing conference (PHC) and heard the parties' positions on the appropriate scope and procedural schedule for this proceeding. Verizon California, Inc., (Verizon) appeared as an interested party in support of the application.

2. Consolidation of Pending SBC Advice Letters 24278 and 24279

In Advice Letters 24278 and 24279, SBC requested that the Commission authorize SBC to file a one-year provisional tariff allowing SBC to waive the otherwise applicable installation charge for customers returning to SBC from other facilities-based carriers. A staff draft resolution denying the advice letters on procedural grounds, as well as an alternate draft resolution, which also denied the request on procedural grounds but affirmed Commission policy on considering non-recurring charges, were both withdrawn, with the understanding that SBC would file an application seeking similar relief. This application ensued, and the advice letters remain pending before the Commission.

The advice letters and this application involve common issues of fact and law. At the PHC, no party objected to consolidating them with this application. Accordingly, pursuant to Rule 55, SBC's Advice Letters 24278 and 24279 are consolidated with the application.

3. Principal Hearing Officer

Pursuant to Pub. Util. Code § 1701.3, ALJ Maribeth A. Bushey is designated as the principal hearing officer in this proceeding.

4. Categorization and Need for Hearing

This ruling confirms Resolution ALJ 176-3132 (April 22, 2004) that this proceeding is ratesetting. This ruling does not confirm that evidentiary hearings

are necessary. At this point, evidentiary hearings are not scheduled. The need for evidentiary hearings will be addressed by subsequent ruling. This ruling, only as to categorization, is appealable under the provisions of Rule 6.4.

5. *Ex Parte* Communications

Since this is a ratesetting proceeding, *ex parte* communications with the Assigned Commissioner, other Commissioners, and the ALJ are generally prohibited. The limited exceptions to this prohibition are described at Pub. Util. Code § 1701.3(c) and Rule 7.

6. Scope of the Proceeding

SBC's application and the now-consolidated advice letters seek the Commission's approval of two different mechanisms. The application seeks broad authority for SBC to lower or waive any tariffed charge to meet a competitor's price. The advice letters seek authority to waive installation service charges for customers returning to SBC from another facilities-based carrier. The scope of the proceeding shall be to determine whether SBC's proposals are consistent with Commission law and policy, and are otherwise in the public interest.

7. Specific Issues to Be Addressed

As discussed below, the initial step in this process will be a motion for summary judgment by SBC. The specific factual, legal, and policy issues to be addressed in the motion for summary judgment are as follows:

- a. Is SBC's proposal to lower its price to meet a competitor's price consistent with the principles of Implementation Rate Design (IRD) Decision (D.) 94-09-065, and its progeny?
- b. If the proposal is not consistent with the IRD decision, does the public interest otherwise justify the proposal?

- c. If the proposal is not consistent with the IRD decision, have the underlying facts changed sufficiently to warrant deviation from the IRD principles?
- d. If the proposal is consistent with the IRD principles, should the Commission approve it as proposed or with modifications?
- e. Is the Telecommunications Division Staff's approach of evaluating proposed changes to a rate by considering the total of all price floors for the included (bundled) services over the expected duration of the services ("total of the floors"), consistent with the IRD decision?
- f. Should the Commission adopt the "total of the floors" approach to evaluating tariff proposals? If so, should non-recurring charges be included? If non-recurring charges are included, how should the Commission set floors for non-recurring charges?

8. Schedule

At the PHC, we determined that a motion for summary judgment by SBC would be an efficient, initial means of addressing the issues raised by the application, with further proceedings to resolve any remaining issues. This initial procedure will resolve policy and legal issues, and identify disputed issues of material fact, if any, that will require future evidentiary hearings.

After the PHC, counsel for TURN sent a letter to the Assigned Commissioner requesting that the summary judgment process be replaced by a proposal, comment, and reply comment process. If the summary judgment proposal is retained, however, TURN requested that all parties be given an opportunity to file replies to other parties' responses to the motion for summary judgment.

We find that TURN's proposals are inconsistent with the objectives of the motion of summary judgment process we adopted. Our objective was to act on SBC's representation that no material facts are in dispute and that the law

supported its position. TURN offers no persuasive rationale to replace the summary judgment process with a notice and comment process. Similarly, allowing the opposing parties to reply to each other's oppositions would not further our goal of efficiently assessing SBC's proposal. We, therefore, decline to adopt TURN's proposals.

At the PHC, we set tentative filing dates for the motions² for summary judgment, responses, and replies. SBC has requested that the final schedule be two weeks shorter than the tentative schedule. We will grant this request and adopt the following schedule:

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|--|--------------------|
| Motion for Summary Judgment Filed and Served | August 2, 2004 |
| Responses to Motion | September 17, 2004 |
| Replies to Responses | October 1, 2004 |
| Projected Submission Date for Motion for Summary Judgment | October 1, 2004 |

Subsequent to resolving the motion for summary judgment, the principal hearing officer will announce any further procedural steps and identify the specific issues to be resolved.

9. Service Lists/Filing and Service of Documents

The official service list for this proceeding is attached to this ruling. The parties shall notify the Commission's Process Office of any address, telephone, or electronic mail (e-mail) change to the service list. The updated service list is available on the Commission's Web page maintained for this proceeding: www.cpuc.ca.gov/published/service_lists/A0403035_65187.htm.

² Verizon requested that it be included as a moving party as well.

The parties shall distribute courtesy copies of all pleadings and testimony in electronic form to the ALJ (mab@cpuc.ca.gov) and those parties who have provided an e-mail address to the Process Office. These courtesy copies do not vacate the Commissioner's rules regarding filing of paper copies, Rule 2.5; the need to serve paper copies on any party without an electronic mail address; and the need to serve paper copies of any document that cannot be electronically distributed.

Therefore, **IT IS RULED** that:

1. The scope of proceedings, specific issues to be addressed in the summary judgment motion, initial schedule, and service list are set forth above.
2. Administrative Law Judge Maribeth A. Bushey is the principal hearing officer.
3. The Commission's preliminary categorization of this proceeding as ratesetting, in Resolution ALJ 176-3132 (April 22, 2004), is confirmed.
4. The *ex parte* prohibition of Pub. Util. Code § 1701.3(c) applies to this proceeding unless otherwise allowed under § 1701.3(c) and Rule 7 of the Commission's Rules of Practice and Procedure.

Dated July 13, 2004, at San Francisco, California.

/s/ GEOFFREY F. BROWN
Geoffrey F. Brown
Assigned Commissioner

/s/ MARIBETH A. BUSHEY
Maribeth A. Bushey
Administrative Law Judge

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***** INFORMATION ONLY *****

(END OF ATTACHMENT)

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge on all parties of record in this proceeding or their attorneys of record.

Dated July 13, 2004, at San Francisco, California.

/s/ KRIS KELLER

Kris Keller

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.